**S T A T E O F M I C H I G A N**

**C O U R T O F A P P E A L S**

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| MICHELE KASETA,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 12, 2007 |
| v | No. 273215<br>Macomb Circuit Court |
| THEODORE BINKOWSKI and CAROL BINKOWSKI,<br><br>Defendants-Appellants. | LC No. 05-001971-NO |

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

WHITBECK, C.J. (*dissenting*).

The Binkowskis contend that the trial court erred in failing to grant their motion for summary disposition given that the ice upon which plaintiff Michele Kaseta fell was open and obvious and possessed no special aspects. I agree. Therefore, I respectfully dissent because, contrary to the majority's opinion, I would conclude that the ice on which Michele Kaseta fell was an open and obvious condition under the undisputed facts of this case. Accordingly, I would reverse.

An invitor has a common law duty to exercise reasonable care to warn or protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land.[1] The basic duty to warn or protect an invitee does not generally include removal of open and obvious dangers. "'Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.'"[2] Determination whether a danger is open and obvious depends on whether it was reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection.[3] The test is objective, and the court should look to whether a reasonable

[1] *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88, on rem 243 Mich App 461 (2000).

[2] *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 3; 649 NW2d 392 (2002), quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

[3] *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005).

person in the plaintiff's position would foresee the danger, not whether a particular plaintiff should have known that the condition was hazardous.[4]

I find unpersuasive Kaseta's claim that there was nothing to alert her to the possibility of ice on the Binkowskis' driveway. First, the weather conditions on the day of Kaseta's accident were such that a reasonable person would anticipate and foresee the possibility of ice on paved surfaces. Snow had fallen early on the day in question, followed by sunshine and warmer temperatures, which served to melt some of the snow. Then in the evening, temperatures dipped, causing melted snow to refreeze into ice. Kaseta, a life-long resident of Michigan, has had considerable experience with such weather. Kaseta even testified that she was aware that the temperature was dropping as the day progressed, and when she exited her car and walked up to the Binkowskis' property, she observed that the street was wet and slushy. All of the paved areas around the Binkowskis' house were clear of snow and ice, but there were mounds of shoveled snow on the Binkowskis' lawn, adjacent to the driveway. Given the temperature fluctuations of the day, a reasonable person would note the possibility of ice forming on the driveway, particularly on the edges of the driveway which were adjacent to the snow. I believe, therefore, that a reasonable person in Kaseta's position would anticipate or foresee that the Binkowskis' driveway could be icy.

I agree with the majority that *Ververis v Hartfield Lanes* is distinguishable because in that case this Court held that "the potential slipperiness of a *snow-covered surface* is an open and obvious danger . . ."[5] Here, the ice was not snow covered. But I am of the opinion that "where there is snow in winter in Michigan, there is likely to be ice and the presence of snow puts a person on notice that there may be slippery conditions."[6]

Even an "open and obvious" condition may be "unreasonably dangerous" if there are "special aspects" of the condition that impose upon the invitor a duty to undertake reasonable precautions to protect invitees from such danger.[7] In determining whether a danger is unreasonably dangerous despite being open and obvious, a court must consider whether such a condition is effectively unavoidable or poses an unreasonably high risk of severe harm.[8] The determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee.[9]

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[4] *Corey*, *supra* at 5.

[5] *Ververis v Hartfield Lanes*, 271 Mich App 61, 63; 718 NW2d 382 (2006).

[6] *Drobot v Way*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket No. 270132), slip op p 2. See also *Crawford v Detroit Entertainment, LLC*, unpublished opinion per curiam of the Court of Appeals, issued August 22, 2006 (Docket No. 266289).

[7] *Mann v Shusteric Enterprises*, 470 Mich 320, 328; 683 NW2d 573 (2004).

[8] *Lugo*, *supra* at 518.

[9] *Id.* at 523-524.

Kaseta cannot establish that the ice posed an unreasonably high risk of severe injury. Although the ice may have posed some risk of injury, the type of danger contemplated by *Lugo* is of a different nature. The critical inquiry is whether there is something unusual about the ice, which because of its character, location, or surrounding conditions gives rise to an unreasonable risk of harm.[10] When analyzing whether an ordinary pothole in a parking lot could give rise to an unreasonable risk of harm, the *Lugo* Court concluded, "Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury."[11] Similarly, the ice in the instant case cannot be considered to have given rise to an unreasonably high risk of severe injury. Moreover, Kaseta could have avoided the driveway all together and chosen an alternate path to get to her car.

For the foregoing reasons, I believe that the trial court erred when it denied the Binkowskis' motion for summary disposition given that the ice was an open and obvious danger possessing no special aspects.

I would reverse.

/s/ William C. Whitbeck

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[10] *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995).

[11] *Lugo*, *supra* at 520.